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# United States Attorneys' Bulletin

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William P. Tyson, Director

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Please send change of address to Editor, United States Attorneys' Bulletin, Room 1629, Main Justice Building, 10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530.

## COMMENDATIONS

Assistant United States Attorney R. MICHAEL BURKE, District of Hawaii, was commended by Mr. C. R. Clauson, Chief Postal Inspector, United States Postal Service, for his preparation and hard work in the conviction of James E. Smith.

Assistant United States Attorney D. MICHAEL CRITES, Southern District of Ohio, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation (FBI), for his successful conclusion of a number of FBI investigative efforts in the Southern District of Ohio.

Assistant United States Attorney CATHY ANN FLEMING, District of New Jersey, was commended by Mr. William H. Webster, Director, Federal Bureau of Investigation, for her outstanding work in a theft from interstate shipment and interstate transportation of stolen property case.

Assistant United States Attorney LORRAINE I. GALLINGER, District of Montana, was commended by Mr. Michael D. Thompson, District Counsel, Veterans Administration, for her outstanding presentation to the staff at Fort Harrison and the medical staff at Miles City Hospital on medical malpractice and medical records.

Assistant United States Attorney JANIS C. GORDON, Northern District of Georgia, was commended by Mr. Weldon L. Kennedy, Special Agent-in-Charge, Federal Bureau of Investigation, for her successful work with undercover operation "Nickelride."

Assistant United States Attorney NINA L. HUNT, Northern District of Georgia, was commended by Dr. James O. Mason, Acting Assistant Secretary for Health, Department of Health and Human Services, for her successful conclusion of Lampshire v. Procter & Gamble and Farnsworth v. Procter & Gamble.

Assistant United States Attorneys PAUL A. KATZ, and KAREN L. KOTHE, District of Arizona, were commended by Mr. Dale W. Cozart, Chief Patrol Agent, United States Border Patrol, Immigration and Naturalization Service, for their successful prosecution of Miguel Martinez-Gil.

Assistant United States Attorney JOHN S. LEONARDO, District of Arizona, was commended by Mr. Howard W. Dobbs, Regional Director, San Diego, Office of Professional Responsibility, Immigration and Naturalization Service, for his successful prosecution of a corrupt government employee.

Assistant United States Attorney STEPHEN C. SCHROEDER, Western District of Washington, was commended by Mr. William G. Gordon, Assistant Administrator for Fisheries, National Oceanic

and Atmospheric Administration, Department of Commerce, for his successful prosecution of several cases arising from United States v. Washington.

Assistant United States Attorney KENNETH F. STOLL, Eastern District of Arkansas, was commended by General Thomas K. Turnage, Director of Selective Service, for his outstanding work in the successful prosecution and conviction of Paul Jacob.

United States Attorney CHARLES H. TURNER, District of Oregon, was commended by Mr. Gerald F. Rodgers, Area Special Officer, Bureau of Indian Affairs (BIA), Department of Interior, for his excellent presentation on the 1984 Comprehensive Crime Control Act in a BIA training session held for law enforcement supervisors.

Assistant United States Attorney KURT F. ZIMMERMAN, District of Connecticut, was commended by Mr. J. Christopher Kohn, Director, Commercial Litigation Branch, Civil Division, Department of Justice, for his successful settlement of United States v. Webster. Assistant United States Attorney ZIMMERMAN was successful in obtaining $1,746,000 for the government.

## CLEARINGHOUSE

### Publication on the Enforcement Authority of Immigration and Naturalization Officers Available.

Copies of the July 1985 revised version of the Immigration and Naturalization Service publication entitled "Statutory Authority of INS Officers," published by the Office of General Counsel of the INS, are available upon request to the Office of Legal Services, Executive Office for United States Attorneys (FTS 633-4024). Please request item number CH-19. The publication contains an outline of cases affecting the enforcement authority of INS officers.

(Executive Office)

## POINTS TO REMEMBER

### Amendments to Rule 6(e), Federal Rules of Criminal Procedure.

Amendments to Rule 6(e)(3)(A)(ii), (B), and (C)(iv), Federal Rules of Criminal Procedure went into effect on August 1, 1985.

Amended Subsection 6(e)(3)(A)(ii) provides that an attorney for the government may disclose grand jury information, without prior judicial approval, to state and local personnel for the

purpose of assisting the government attorney in the performance of his/her duty to enforce federal criminal law. The Section states:

> (3) Exceptions:
>
> (A) Disclosure otherwise prohibited by this Rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to --
>
> * * *
>
> (ii) Such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

The amendment to Subsection 6(e)(3)(B) imposes upon the attorney for the government the responsibility to certify to the district court that those persons to whom disclosure was made under (e)(3)(A)(ii) have been advised of the obligations of secrecy under Rule 6. The Section states:

> (B) Any person to whom matters are disclosed under Subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this Rule.

The Office of Legal Services has drafted, with the assistance of several United States Attorneys, a sample form (appended to this Bulletin) notifying the district court of the persons to whom disclosure of grand jury materials is made. Pursuant to United States Attorney suggestion, it contains a certification by the attorney for the government that all persons receiving such information have been advised of the obligations of secrecy imposed by Rule 6, in accordance with the requirements of Subdivision 6(e)(3)(B).

The appended form is not mandatory and the entire form or any portion thereof may be used/not used subject to the prevailing local rules or policies of your districts. However, since this form was intended only as a sample, if you choose not to use it, you will need to devise some notice form pursuant to the new Rule.

Amended Subsection 6(e)(3)(C)(iv) provides that an attorney for the government may disclose grand jury information, with prior judicial approval, to state and local personnel when the information may disclose a violation of state criminal law purpose of enforcing such law. The amended Section states:

> (3) Exceptions:
>
> (C) Disclosure otherwise prohibited by this Rule of matters occurring before the grand jury, may also be made --
>
> * * *
>
> (iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

This section will now permit the disclosure of evidence developed during a federal grand jury investigation which tends to show a violation of state law to appropriate state officials for further investigation.

In order to secure the passage of this amendment, the Department agreed to establish the policy whereby such disclosure may be sought only upon approval of the appropriate Assistant Attorney General with subject matter supervision over the case.

Therefore, before disclosure under Section 6(e)(3)(C)(iv) is sought, prior approval must be obtained. Although the Advisory Committee note to the Rule states that approval should be sought from the Assistant Attorney General of the Criminal Division, the Department is interpreting this to mean approval by the Assistant Attorney General with subject matter jurisdiction over the case. Should this become an issue, the Assistant Attorney General has prepared a memorandum to the Assistant Attorneys General of the other litigating divisions advising them of this, a copy of which may be obtained from the Office of Legal Services.

At this time, there is no indication that the approval request must be in writing. Therefore, oral approval may be sought.

Also note that the 1985 Edition of the West Publishing Company publication entitled Federal Criminal Code and Rules, contains incorrect information regarding the recent amendment to Rule 6(e).

On October 12, 1984, as a part of the Comprehensive Crime Control package enacted by Congress (Pub. L. No. 98-473), Title II, 215(f), 235(a)(1), provided that, effective November 1, 1986, subsection (e)(3)(C) of Rule 6(e) of the Federal Rules of Criminal Procedure would be amended by adding a subsection (iv), the language given above. However, Subsection (e)(3) of Rule 6 of the Federal Rules of Criminal Procedure was amended by Order of the Supreme Court on April 29, 1985, to read as indicated above. The amendments of the Supreme Court went into effect on August 1, 1985, and govern all proceedings in all future criminal cases and all pending criminal cases insofar as is just and practicable. The Supreme Court's amendment was submitted to Congress in accordance with the provisions of 18 U.S.C. §3771 and §3772.

Therefore, the information contained in the Federal Criminal Code and Rules appears to have been an oversight on the part of the West Publishing Company and the material was, in all probability, submitted for publication before the Supreme Court amendments were adopted.

Should you have additional questions, contact the Office of Legal Services at FTS 633-4024.

(Executive Office)

Advisement Against Proposing Judicial Orders Which Specifically Direct Forfeited Property to be Shared With State and Local Agencies.

It has come to the attention of the Department of Justice that several federal prosecutors have asked the district courts to address in forfeiture orders the issue of transferring forfeited property to state and local law enforcement authorities. By memorandum of May 23, 1985, Assistant Attorney General Stephen S. Trott, outlined the pertinent statutes and their legislative histories, illustrating that they do not provide the courts with any role in the decision to share forfeited property with state and local law enforcement agencies. As a result, federal prosecutors should not propose forfeiture orders which contain language directing the government to share forfeited property with state and local governments. Instead, proposed orders should instruct the government only to dispose of forfeited assets in accordance with the law. A copy of Mr. Trott's memorandum is appended to this Bulletin.

(Executive Office)

JURIS Data Base List

Appended to this issue of the Bulletin is the most recent revised JURIS Data Base Listing, dated May 1985.

(Justice Management Division)

Personnel.

Effective August 16, 1985, Stanley Marcus was sworn in as a United States District Court Judge for the Southern District of Florida.

Effective August 16, 1985, Leon B. Kellner was court appointed United States Attorney for the Southern District of Florida.

Effective August 26, 1985, James G. Richmond was court appointed United States Attorney for the Northern District of Indiana.

(Executive Office)

Purging United States Attorney Case Files.

The Executive Office for United States Attorneys is responsible for the processing of requests for access to United States Attorneys' records under the Freedom of Information Act and Privacy Act (FOIA/PA). Frequently, the FOIA/PA Unit of the Executive Office receives records which are innocuous and time-consuming to review. This is to remind all Assistant United States Attorneys that when closing files (prior to referring them to a Federal Records Center), the files may and should be purged of all non-record material. See USAM, Title 10-4.31, (Closing Notice for Case Files); OBD 2710.2B, March 25, 1985, (Disposition Schedule for United States Attorneys' Records); and OBD 2710.3A, December 9, 1980, page 31, paragraph 32d (Files Maintenance and Records Disposition).

Materials which may be routinely purged are:

1. Duplicate copies.
2. Return receipt forms.
3. Attorney work product (notes) except those containing remarks of significant record value.
4. Envelopes.
5. Routing Slips.
6. Telephone Notes.
7. Drafts.
8. Publications (including newspaper articles and cases from the West Reporter series).

It is suggested that case reports and copies be returned to the originating investigative agencies.

If you have any questions, please contact the Freedom of Information Act/Privacy Act Unit at FTS 633-4970.

(Executive Office)

Teletypes to All United States Attorneys

A listing of recent teletypes sent by the Executive Office is appended to this Bulletin. If a United States Attorney's office has not received one or more of these teletypes, copies may be obtained by contacting Ms. Theresa Bertucci, Chief of the Communications Center, Executive Office for United States Attorneys, at FTS 633-1020.

(Executive Office)

Torts Branch Representation Monographs

The successful defense of federal employees by application of the doctrine of immunity requires a thorough understanding of the policy and law of immunity in its various forms: absolute, qualified, presidential, judicial and legislative. To provide federal attorneys with a strategical and tactical resource to use in preparing and presenting immunity defenses on behalf of federal employees, the Civil Division has completed the third monograph entitled Torts Branch Representation Monograph III: Immunity of Federal Employees in Personal Damages Actions. The fourth monograph entitled Torts Branch Representation Monograph IV: Defending 42 U.S.C. §§1981-1988 Suits is scheduled for publication early in 1986.

A limited number of copies of the third monograph may be obtained by contacting Paralegal Specialist Matthew Lorelli of the Torts Branch of the Civil Division at FTS 724-6807.

Due to the limited supply of these monographs, interested Assistant United States Attorneys may want to reproduce the above-listed monographs locally.

(Civil Division)

## CASENOTES

### OFFICE OF THE SOLICITOR GENERAL

The Acting Solicitor General has authorized the filing of:

A petition for writ of certiorari in Pierce County v. United States, Nos. 83-7504 and 83-7505 (9th Cir. May 7, 1985). The question presented is whether Section 106(b) of CETA imposes a strict requirement upon the Secretary of Labor to seek repayment of misused CETA funds within 120 days after receiving a complaint.

A brief amicus curiae supporting certiorari in Square D Co. v. Niagara Frontier Tarriff Bureau, S. Ct. No. 85-21. The question presented is whether the Keogh doctrine bars shippers from recovering antitrust damages when carriers set rates collectively in violation of a ratemaking agreement approved by the Interstate Commerce Commission.

### CIVIL DIVISION

SUPREME COURT HOLDS THAT FOR ALL CIVIL ACTIONS, INCLUDING CIVIL RIGHTS LITIGATION, "COSTS" TO BE PAID BY OFFEREE AFTER REJECTING A PRE-TRIAL SETTLEMENT OFFER, PURSUANT TO FEDEDERAL RULES OF CIVIL PROCEDURE 68, INCLUDES ALL COSTS PROPERLY AWARDABLE, INCLUDING ATTORNEYS' FEES.

Petitioners, three state police officers, in answering a call on a domestic disturbance, shot and killed respondent's son. Respondent filed suit in the district court against the officers under 42 U.S.C. §1983 and state tort law. Before trial, petitioners made a settlement offer, to include costs and attorneys' fees, of $100,000. Respondent rejected the offer. After trial, respondent was awarded a total of $60,000 in damages. Respondent filed a request for $171,692.47 in costs, including attorneys' fees. The amount also included costs incurred after rejection of the settlement offer. Petitioners opposed, relying on Federal Rules of Civil Procedure 68, which requires plaintiff to pay all costs incurred after the offer, if the judgment obtained is not more favorable than the offer. Petitioners contended that attorneys' fees are included within the "costs" covered by Rule 68.

The district court accepted the petitioners' contention, but the Seventh Circuit reversed. The court of appeals held that §1988, which allows a prevailing party in a §1983 action to be awarded attorney's fees "as part of the costs," nonetheless did not contemplate the awarding of attorney's fees as part of the costs within the meaning of Rule 68. The court of appeals reasoned that such an interpretation would prejudice civil rights plaintiffs by deterring them from litigation. The Supreme Court granted certiorari and we filed an amicus brief in support of petitioners. The Supreme Court has now reversed the court of appeals, ruling that "the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. . . . Thus, absent Congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, . . . such fees are to be included as costs for purposes of Rule 68." Such an interpretation, the Court noted, was in keeping with the Rule's objective of encouraging settlements. "There is no evidence," the Court added, "that Congress, in considering §1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned." Petitioners were accordingly held not liable for $139,692 in costs incurred by respondent after the settlement offer.

Marek v. Chesny, ___U.S.___, No. 83-1437 (June 27, 1985). D. J. # 145-0-1408.

Attorney: Robert S. Greenspan (Civil Division) FTS 633-5428.

## SUPREME COURT HOLDS THAT LEGAL DEFENSE AND POLITICAL ADVOCACY GROUPS MAY BE EXCLUDED FROM COMBINED FEDERAL CAMPAIGN.

The Combined Federal Compaign (CFC) is an annual charitable fund-raising drive conducted in the federal workplace during working hours through voluntary efforts of federal workers. By Executive Order, participation is limited to charities that furnish direct health and welfare aid, and excludes legal defense and political advocacy organizations. Various groups falling into the latter classifications brought this suit challenging their exclusion on First Amendment grounds. By a 4-3 vote, the Supreme Court, reversing the lower court decisions, has just upheld the exclusion as reasonably designed to minimize disruption to the federal workplace, to encourage the success of the fund-raising efforts, and to avoid the appearance of political favoritism. The Court remanded the case to consider plaintiffs' claims, not decided by the lower courts, that the exclusion was in fact based on an impermissible rationale--that the government allegedly simply disagreed with plaintiffs' viewpoints.

Cornelius, Acting Director, OPM v. NAACP Legal Defense & Educational Fund, Inc., ___ U.S. ___, No. 84-312 (July 2, 1985). D. J. # 145-156-371.

Attorney: Paul Blankenstein (Civil Division) FTS 633-3602.

CHIEF JUSTICE BURGER VACATES AN ORDER OF THE D.C. CIRCUIT IN WHICH THE COURT OF APPEALS HAD EXERCISED JURISDICTION OVER THE DENIAL OF A TRO AND HAD INDEFINITELY STAYED OPM PERSONNEL RULES.

The Office of Personnel Management's (OPM) new personnel regulations for the federal service, scheduled to go into effect on July 1, 1985, place more emphasis on an individual's merit, and less emphasis on his or her seniority. On June 27, 1985, the American Federation of Government Employees (AFGE) and the National Treasury Employees Union (NTEU), two unions representing federal employees, filed suit in federal district court seeking a TRO preventing the new rules from taking effect. They asserted that the rules, which had been suspended by Congress for several years, required new APA notice and comment procedures and that the rules were arbitrary and capricious. On June 28, 1985, after a lengthy hearing, Judge Thomas Penfield Jackson denied the TRO. Judge Jackson found no likelihood of success on the merits and no irreparable harm to the unions or their membership from having the new rules take effect.

The AFGE then filed a motion with the D.C. Circuit seeking emergency injunctive relief. On Saturday, June 29, 1985, a motions panel of the court of appeals (Judges Edwards, Wald, and Wright, with Judge Wright not participating but later concurring in the result) considered AFGE's emergency motion, and held that the TRO was tantamount to a preliminary injunction and that the harms alleged by the AFGE (impending personnel actions based on the new rules) "might well be irreparable;" it therefore took jurisdiction over the case. The panel then entered an indefinite "administrative stay" which enjoined the effective date of the new regulations "until further order of the court." The panel ordered the district court to hold a preliminary injunction hearing and reach a decision by July 10, 1985, and retained jurisdiction, to "entertain any motion to this court following the district court's decision," commenting unfavorably on the merits of the government's case.

On July 2, 1985, the Solicitor General filed a motion with Chief Justice Burger, as Circuit Justice, asking that the court of appeals order be vacated, and on July 3, the Chief Justice issued an order vacating the court of appeals' order. A memorandum decision followed.

In this decision the Chief Justice held that the court of appeals had no jurisdiction to review the district court's denial of a TRO, and was without authority to grant an "administrative stay," emphasizing that denials of temporary restraining orders are ordinarily not appealable. He held that in this case the denial of the TRO was not in any sense a de facto denial of a preliminary injunction, which is an exception to the nonappealability rule. The Chief Justice also held that there was no other independent basis on which court of appeals jurisdiction could rest. Unlike the situation that would have existed if the TRO had been granted, the denial of the TRO, in the view of Chief Justice Burger, merely preserved the status quo by allowing implementation of the regulations "in accordance with the express intent of Congress."

The AFGE filed a motion with the full Supreme Court, asking that the Court stay the order entered by the Chief Justice. The NTEU, which was not a party to the case before the court of appeals, filed a motion to intervene, and a motion to stay. On July 18, 1985, the full Court (with Justices Brennan and Powell not participating) granted the NTEU's motion to intervene but denied the stay motions. The new OPM rules are currently in effect.

Office of Personnel Management v. American Federation of Government Employees, ___U.S.___, No. A-5 (July 5, 1985). D. J. # 145-156-478.

Attorneys: Robert E. Kopp (Civil Division) FTS 633-3311; William Kanter (Civil Division) FTS 633-1597; Richard A. Olderman (Civil Division) FTS 633-4052.

JUSTICE REHNQUIST STAYS PRELIMINARY INJUNCTION THAT REQUIRED IMMEDIATE PROMULGATION OF NATIONWIDE REGULATIONS MODIFYING THE MEDICARE PROSPECTIVE PAYMENT SYSTEM.

Pursuant to a statutory mandate, the formula under which payments are made to hospitals for services rendered to Medicare beneficiaries is in the process of being converted to a prospective payment system (PPS). As the conversion to PPS proceeds, each year a diminishing percentage of a hospital's payment is based upon its actual costs incurred in a "base year" (the so-called "hospital-specific rate") and a greater percentage is based upon a predetermined rate for each discharge depending upon the patient's diagnosis.

In this case Redbud Hospital challenged the hospital-specific rate that had been set for it. Redbud argued that it should receive an upward adjustment in the rate because it had added to its facilities after its "base year," because it serves a dispro-

portionate number of Medicare patients, and because it is the sole hospital in the small community where it is located. Health and Human Services (HHS) moved to dismiss Redbud's complaint on the ground that Redbud had failed to exhaust its administrative remedies, but the district court denied that motion and instead entered a preliminary injunction. Under the injunction, HHS was barred from imposing the PPS-transition rates on Redbud, or otherwise reducing Redbud's payments, until HHS promulgated new regulations providing for the kinds of adjustments in hospital-specific rates that Redbud sought and used them to recalculate Redbud's rate; in addition, HHS was ordered to promulgate a regulation providing access to immediate administrative review for hospitals with claims like Redbud's. However, as originally drafted by the district court, the preliminary injunction contained no deadline for promulgating such new regulations.

Following several months of unsuccessful settlement negotiations, Redbud asked the district court to modify the preliminary injunction to require immediate promulgation of new regulations by HHS. The district court granted Redbud's motion and gave HHS two weeks to publish the new regulations. We sought an emergency stay pending appeal from the Ninth Circuit, but our motion was denied. We then applied to Justice Rehnquist, as Circuit Justice, for a stay, and that application has been granted.

The order granting the stay makes it clear that the portion of the original preliminary injunction, requiring HHS to maintain the status quo vis-a-vis Redbud while this case proceeds, is proper and is to remain in effect. However, the "kind of sweeping 'preliminary' relief" that the district court ordered in the "requirement that [HHS] promulgate new nationwide regulations cannot possibly be justified." Indeed, "Redbud did not even seek regulatory reform" and the district court's decision requiring promulgation of new regulations "is plainly not necessary to protect Redbud's interests in this litigation." Thus, Justice Rehnquist was convinced both that a court of appeals' affirmance of the district court's order "would prompt at least four members of the Court to grant review" and that the "stay equities" favored HHS.

Heckler v. Redbud Hospital District, ___U.S.___, No. A-32 (July 24, 1985). D. J. # 137-11-1013.

Attorneys: Anthony J. Steinmeyer (Civil Division) FTS 633-3388; Marc Johnston (Civil Division) FTS 633-3305.

D.C. CIRCUIT OVERTURNS DISTRICT COURT RULING, AND HOLDS THAT THE LEGISLATIVE VETO PROVISION IN THE EMPLOYEE PROTECTION SECTION OF THE AIRLINE DEREGULATION ACT IS SEVERABLE FROM THE REMAINDER OF THE SECTION, WHICH IS THEREFORE CONSTITUTIONAL.

When Congress passed the Airline Deregulation Act, it was concerned that deregulation might have a disruptive impact on employees in the airline industry. Accordingly, it provided an airline employee protection provision which, among other things, requires that qualified airline employees who are laid off have a right of first-hire option with other airlines. However, Congress attached a legislative veto provision to this section. When the Secretary of Labor issued implementing regulations, the airlines brought suit challenging the validity of the underlying statutory provision and the regulations. The government conceded that the legislative veto provision was invalid, but argued that it was severable from the remainder of the section. The district court held that the legislative veto provision was inseverable, and, therefore, struck down the entire employee protection provision as unconstitutional. We appealed and the D.C. Circuit has agreed with our argument completely. The court first held that it, rather than the Supreme Court, had appellate jurisdiction because the constitutionality of the legislative veto provision was not at issue, and the sole question was one of severability, which did not fall within the direct Supreme Court review provision. The court then held that the burden was on the airlines to show that Congress would have preferred to have no employee protection provision at all if it could not have one with a legislative veto attached. The airlines were unable to meet this high standard. The case has now been remanded for consideration of other challenges to the statute and the regulations.

Alaska Airlines v. Donovan, ___F.2d___, No. 84-5442 (D.C. Cir. July 16, 1985). D. J. # 145-10-2458.

Attorneys: Anthony J. Steinmeyer (Civil Division) FTS 633-3388; Douglas N. Letter (Civil Division) FTS 633-3427.

D.C. CIRCUIT REVERSES DISTRICT COURT ORDER REQUIRING DISCLOSURE OF CLASSIFIED INFORMATION PERTAINING TO THE PROTECTION OF NUCLEAR FACILITIES AGAINST SABOTAGE OR TERRORIST ATTACK.

Plaintiffs initiated this Freedom of Information Act case in 1977, seeking various documents dealing with nuclear plant security. Eventually, the case focused solely on a redacted page of one document. This document is known as the GESMO Study and the redacted page contains the NRC's official policy on the number

of attackers that the NRC requires nuclear facilities to guard against. The NRC placed into the record numerous affidavits explaining that the document is classified because release would provide invaluable information to any group planning an attack on a nuclear facility. The district court, however, ordered the document released, reasoning that there were other estimates in the public domain that, in its view, were more sensitive than the GESMO Study. The D.C. Circuit has now reversed the district court's order requiring disclosure and has directed that summary judgment be entered for the NRC. The court concluded that the classification explanation in the NRC's affidavits was reasonable and uncontroverted. The court acknowledged that there are other documents in the public domain estimating the size of an attack force on a nuclear facility, nonetheless, the court stressed that unlike the GESMO Study, these other documents did not represent official NRC policy on the matter. Apart from protecting this obviously sensitive information, the opinion reaffirms that even if there is public speculation about the classified information, the agency may continue properly to classify information that has not been the subject of an official acknowledgement.

Abbotts v. Nuclear Regulatory Commission, ___F.2d___, No. 84-5423 (D.C. Cir. July 9, 1985). D. J. # 145-0-809.

Attorneys: Leonard Schaitman (Civil Division) FTS 633-3441; Nicholas Zeppos (Civil Division) FTS 633-5431.

FIRST CIRCUIT HOLDS EDUCATION DEPARTMENT MAY DENY AID TO STUDENTS WHO REFUSE, FOR RELIGIOUS REASONS, TO STATE WHETHER THEY ARE REQUIRED TO REGISTER FOR THE DRAFT.

In this case, three theology students applying for federal student aid refused to fill out a form requiring them to state whether they were eligible for the draft. Regulations of the Department of Education required completion of the form as a condition of aid. The regulations were issued pursuant to the Solomon Amendment, which provides that draft-eligible persons who have not registered may not receive federal student aid. Plaintiffs in this case alleged that they are not draft-eligible (two plaintiffs are female, while one is over age). They object on religious grounds to completing a form which assists the Selective Service System.

The district court held the plaintiffs must be granted aid despite their refusal to complete the form. The court held that the Solomon Amendment authorized denial of aid only for draft-eligible students who have refused to register--not for non-draft eligible students who refuse to supply the Department with information concerning their eligibility.

On the government's appeal, the First Circuit reversed. In a lengthy opinion, the court concluded that regulations may "cover individuals not included in the statutory scheme" if there is a reasonable basis for doing so. In this case it was reasonable for the Secretary to enforce the Solomon Amendment by asking aid applicants whether they were eligible for the draft, and thus the Secretary could ask this question of non-draft eligible students even though the Solomon Amendment does not apply to them. The court of appeals also disagreed with the district court's conclusion that denial of aid was an "excessive sanction" for refusal to fill out the form. The court concluded that no sanction was involved:

> "In denying plaintiffs benefits, the Secretary is simply saying that if an individual is unwilling to tell the government that he or she fulfills the conditions for aid, the government will not dispense it."

Finally, the court held that there were no substantial constitutional issues mandating a narrow construction of the Solomon Amendment. Any burden on the right of free exercise of religion was, the court held, "at best remote and tangential." The court held that administrative convenience was a sufficient justification for the regulation as against "a mere claim of right to withhold routine personal data which, by itself, has no religious significance to plaintiffs and is being withheld solely because elicited to show exemption from a program plaintiffs abhor. If administrative convenience must give way on this occasion, we would fear the erosion of the government's essential right to obtain from its citizens, without endless litigation and hassle, the basic information needed to govern."

Judge Breyer dissented, on the ground that plaintiffs had already given the University information regarding their age and sex on another form, and thus should have been considered to have been in "substantial compliance" with the Secretary's regulation.

Alexander v. Trustees of Boston University and Selective Service System, ___ F.2d ___, No. 84-1712 (1st Cir. June 25, 1985). D. J. # 145-16-2434.

Attorneys: Leonard Schaitman (Civil Division) FTS 633-3441; Robert V. Zener (Civil Division) FTS 633-4027.

SECOND CIRCUIT HOLDS THAT STATE LAW GOVERNS THE UNITED STATES' CLAIM FOR CONTRIBUTION ARISING OUT OF ITS OBLIGATIONS IN REGULATING AVIATION SAFETY.

This action stems from the crash of an Overseas Airways jet after its engine ingested a number of seagulls during takeoff at JFK International Airport. The airline sued the United States

alleging negligence in certifying the plane for takeoff. The United States in turn commenced third-party actions against the Port Authority of New York which operates the airport, and against the City of New York as operator of two garbage dumps near the airport that attract large numbers of gulls. All parties except the City eventually settled with plaintiff, and this action for contribution and indemnity ensued. The district court granted the City's motion for summary judgment, holding that state, as opposed to federal, common law governed the action. The parties agreed that under state law, the United States could not obtain contribution from the City as a non-settling tortfeasor, but that under federal common law, a contribution action would lie.

A divided panel of the court of appeals has just affirmed. While the majority noted that "[w]ere we free to act upon the policy considerations detailed by the government in its argument, we might indeed be inclined to create such a federal rule of contribution," it held that Congress through the FTCA has directed application of state law in the instant circumstances. Judge Oakes dissented, agreeing with us that though Congress in the FTCA provided that state law should be the rule of decision in tort suits against the United States, it has remained silent as to what rule of decision should apply in suits brought by the United States, which, of course, may implicate quite different concerns. Because of the substantial federal interests in ensuring a standard of due care in operating airports, in promoting uniformity of obligations under the Federal Aviation Act, and in encouraging settlement of FTCA suits, he would have chosen a federal rule of decision to govern the action.

Overseas National Airways v. United States, ___F.2d___, Nos. 84-6232, 84-6254 (2d Cir. June 27, 1984). D. J. # 157-52-2416

Attorneys: Robert S. Greenspan (Civil Division) FTS 633-5428; Harold J. Krent (Civil Division) FTS 633-3159.

SECOND CIRCUIT HOLDS THAT DISTRICT COURT ABUSED ITS DISCRETION IN ENJOINING POSTAL SERVICE FROM DISCHARGING EMPLOYEE PENDING ARBITRATION, DESPITE CLAIMS THAT THE DISCHARGE CHILLED THE EMPLOYEES' EXERCISE OF FIRST AMENDMENT RIGHTS.

In the midst of a labor dispute, Phillip Danko, a local union president, wrote a letter to a major customer of the New London Post Office, charging that as a result of the Postal Service's decision to eliminate employees at the Office, their mail was being significantly delayed. Postal Service inspectors concluded that the charge was untrue, and determined that the letter constituted conduct prejudicial to the Postal Service by besmirching its integrity. The Service thereupon discharged Danko. Danko's union

responded by filing an unfair labor practice charge with the NLRB and a grievance under the collective bargaining agreement on Danko's behalf. The union also commenced the instant action for injunctive relief, asserting that the discharge would cause Danko irreparable injury and chill the First Amendment rights of fellow employees. The court granted the preliminary injunction, reasoning that the injunction was "in aid of arbitration" by preserving the status quo. The court also found that the potential chilling effect constituted irreparable injury sufficient to take this case out of the mold of Sampson v. Murray, 415 U.S. 61 (1974).

The Second Circuit reversed, holding that appellees had failed to demonstrate irreparable harm. First, the court noted that the letter to the Postal Service's customer deserved some First Amendment protection under the Supreme Court's decision in Connick v. Myers, 461 U.S. 138 (1983), since it concerned a matter of public interest. But the court reasoned that any chilling effect on employees' rights stemmed not from the interim discharge pending arbitration, but from the threat of permanent dicharge which is not vitiated by an interim injunction. Moreover, the court noted that the injunction was not "in aid of jurisdiction" since the arbitrator has the power to grant Danko full relief. Since no irreparable injury could be shown, the court vacated the injunction.

American Postal Workers Union v. United States Postal Service, ___F.2d___, No. 84-6329 (2d Cir. July 3, 1985). D. J. # 145-5-5896.

Attorneys: Mark Gallant (Civil Division) FTS 633-3425; Harold J. Krent (Civil Division) FTS 633-3159.

THIRD CIRCUIT HOLDS THAT PLAINTIFFS SEEKING NATION-WIDE WARNING FOR ATOMIC VETERANS REGARDING POSSIBILITY OF MUTAGENIC DEFECTS SHOULD FIRST EXHAUST ADMINISTRATIVE REMEDIES.

In this class action, plaintiffs sought an injunction requiring the government to warn atomic veterans and their families of the risk of mutagenic defects arising from participation in the government's atmospheric nuclear tests. The government moved the court to dismiss or stay on the ground that plaintiffs should be required in the first instance to seek relief from the Defense Nuclear Agency. The district court granted the motion and dismissed the case.

On appeal, the Third Circuit held that the district court did not abuse its discretion in requiring plaintiffs to exhaust their administrative remedies. The panel held, however, that the district court should have stayed, not dismissed, the action.

Although the panel's decision is unpublished, it indicates that an exhaustion defense is viable in situations where, as here, exhaustion is not statutorily compelled and no administrative procedure exists expressly for the purpose of addressing a party's claim. If the principles underlying the exhaustion doctrine are advanced, and if the agency represents that it will examine a party's claim, exhaustion may be appropriate.

Punnett v. United States, ___F.2d___, No. 84-1697 (3d Cir. June 27, 1985). D. J. # 145-1-714.

Attorneys: John F. Cordes (Civil Division) FTS 633-3380; Roy Hawkens (Civil Division) FTS 633-4331.

THIRD CIRCUIT AFFIRMS DISTRICT COURT'S DISMISSAL OF RELATED CHALLENGE TO TRIAL AND EXECUTION OF BRUNO RICHARD HAUPTMANN FOR THE MURDER OF LINDBERGH BABY.

In 1935, Bruno Richard Hauptmann was tried and convicted of the murder of Charles A. Lindbergh, Jr., the infant son of Charles Lindbergh and Anne Morrow Lindbergh. After exhausting his appellate avenues and collateral attacks on his conviction, Hauptmann was executed in 1936.

In 1981 his widow, Anna Hauptmann, filed suit against the prosecutor and various former New Jersey state policemen and a former FBI agent who were involved in the investigation of the kidnapping and murder of the Lindbergh baby and in the subsequent trial of Hauptmann. On the basis of facts Mrs. Hauptmann claimed to have discovered for the first time in 1981, when her attorney gained access to FBI files in connection with another case, she claimed that Hauptmann was not given a fair trial, that exculpatory evidence was withheld from the defense, and that Hauptmann was innocent. She sought damages for alleged violation of Hauptmann's civil and constitutional rights, as well as his common law rights, access to the State of New Jersey's files on the case, and a declaration that Hauptmann was innocent.

The district court, after lengthy discovery, briefing, and arguments, as well as four amended complaints, ruled that Mrs. Hauptmann had failed to plead her civil rights and constitutional claims with requisite specificity to state a claim for relief. In a later opinion, the district court dismissed the state law claims on statute of limitations grounds.

Mrs. Hauptmann then appealed the dismissal arguing primarily that whether she acted with reasonable diligence in discovering facts giving rise to her action was a triable issue of fact. In a one-sentence order the Third Circuit held, "after considering the contentions raised by appellant . . . the judgment

of the district court . . . is hereby affirmed." The court taxed costs against appellant.

Hauptmann v. Wilentz, ___F.2d___, No. 84-5454 (3d Cir. July 11, 1985). D. J. # 157-48-1730.

Attorneys: Barbara L. Herwig (Civil Division) FTS 633-5425; Freddi Lipstein (Civil Division) FTS 633-3542.

THIRD CIRCUIT UPHOLDS THE WITHHOLDING OF AN FBI CRIMINAL INVESTIGATION FILE UNDER FOIA EXEMPTION 2, 3, 7(C), 7(D) AND 7(E), EVEN THOUGH SOME OF THESE CLAIMS WERE RAISED FOR THE FIRST TIME ON REMAND.

A Philadelphia journalist requested disclosure under the Freedom of Information Act of certain information in the FBI's files relating to its investigation of two high-ranking Pennsylvania politicians in 1978, one of whom was convicted and the other of whom pleaded nolo contendere. Plaintiff wanted the FBI's Form 302's (on which agents record raw information, particularly from witness interviews) for a long list of persons involved in the case. The district court initially upheld claims under exemptions 7(C) and 7(D) (law enforcement records that would invade privacy or reveal the identities of confidential sources). The Third Circuit reversed and remanded in 1981, requiring the FBI to provide in camera a detailed justification for each document withheld. On remand, the district court undertook a massive effort to examine the documents and the in camera affidavit and it prepared a lengthy under-seal opinion that makes findings as to each document. The district court also accepted claims of new exemptions raised for the first time on remand, namely exemptions 2 (internal personnel matters), 3 (grand jury), and 7(E) (investigative techniques). The Third Circuit has now affirmed. Viewing the district court's actions below as a hybrid summary judgment, because of its extensive in camera review, the court of appeals decided that the regular plenary review on appeal of the grant of summary judgment does not apply. Instead, it applied a two-step review' (1) did the district court have an adequate factual basis for its decision; and, (2) was its decision clearly erroneous. On that basis, and after its own examination of the under-seal opinion and the in camera materials, the court affirmed. It also upheld the raising of new exemptions on remand, construing earlier cases that restrict later raising of new exemptions as principally addressing claims raised for the first time on appeal.

Lame v. Department of Justice, ___F.2d___, No. 84-1615 (3rd Cir. July 15, 1985). D. J. #145-12-4381.

Attorneys: Leonard Schaitman (Civil Division) FTS 633-3441; Frank Rosenfeld (Civil Division) FTS 633-4027.

FIFTH CIRCUIT ADOPTS "LITIGATION POSITION" INTERPRETATION OF THE EQUAL ACCESS TO JUSTICE ACT IN FINDING THAT THE "POSITION" OF THE NATIONAL MEDIATION BOARD WAS "SUBSTANTIALLY JUSTIFIED."

In a prior decision reviewing the National Mediation Board's dismissal of a petition for a representation election filed by certain railroad employees under the Railway Labor Act, the Fifth Circuit had held that the Board had exceeded its powers in adopting positions characterized by the court as "Orwellian and Kafkaesque." Russell v. National Mediation Board, 714 F.2d 1332 (5th Cir. 1983). The plaintiffs thereafter filed in the district court a petition for fees under the Equal Access to Justice Act (EAJA). This petition was filed more than 30 days after the final judgment of the court of appeals but before the expiration of the time for seeking certiorari.

In an extensive opinion, the Fifth Circuit held that the 30-day time period for filing petitions under the EAJA is jurisdictional, but does not begin to run "until the government's time for filing a petition for writ of certiorari has lapsed or the government has given notice that it will not file such a petition." (Slip op. at 5081-82). The court thus concluded that the petition for fees was timely. However, the court went on to rule that the "position of the United States" for purposes of applying the "substantial justification" test of the EAJA was the "litigation position," not the "underlying position" of the agency. In so holding, the court accepted our argument that the legislative history of the EAJA legislation passed by Congress but vetoed by President Reagan was entitled to little weight in assessing Congressional intent under the original Act, expressly rejecting the contrary analysis of the Third Circuit in Taylor v. United States, 749 F.2d 171, 174 (3d Cir. 1984).

Russell v. National Mediation Board, ___F.2d___, No. 84-1345 (5th Cir. June 28, 1985). D. J. # 145-0-1170.

Attorneys: William Kanter (Civil Division) FTS 633-1597; Mark W. Pennak (Civil Division) FTS 633-4214.

NINTH CIRCUIT UPHOLDS DISTRICT COURT'S AWARD OF SUMMARY JUDGMENT IN FAVOR OF FEDERAL EMERGENCY MANAGEMENT AGENCY IN SUIT BY POLICYHOLDER INSURED UNDER NATIONAL FLOOD INSURANCE PROGRAM.

This action was brought by a property owner whose realty was covered by an insurance policy issued under the National Flood Insurance Program, administered by the Federal Emergency Management Agency (FEMA). In essence, the dwelling sustained flood damage at a time after the policy had lapsed but before it

had been reinstated under FEMA's regulations and the terms of the policy. Specifically, the damage occurred after the initial policy term had expired and after the insured had mailed his tardy premium to FEMA. According to its regulations and the standard policy form, FEMA reinstated coverage one day after its physical receipt of the premium. The property sustained damage on the same day that FEMA received the premium, i.e., one day before it reinstated coverage. The heart of plaintiff's claim that he was entitled to payment under his policy was his contention that state law (here, that of California) governed his claim. Based on state law, plaintiff argued that he was entitled to notice of the policy's expiration, which he denied receiving, before coverage lapsed and that, under the normal common law "mailbox rule," his coverage was reinstated at the time he dispatched his premium to FEMA. The district court rejected these contentions and, finding no controverted issues of fact, granted FEMA's motion for summary judgment.

In a unanimous opinion, the Ninth Circuit has affirmed. Most important, the court held that federal law, not state law, governs claims that arise under the federal flood insurance program. Its decision is the most direct holding to date by a court of appeals on this issue. The court also cited with approval district court decisions holding that losses occurring after expiration and before policy renewal are not covered under the flood insurance program.

Brazel v. Giuffrida, ____ F.2d ____, No. 84-2138 (9th Cir. June 19, 1985). D. J. # 145-17-3708.

Attorneys: Mark Gallant (Civil Division) FTS 633-3425; Peter Maier (Civil Division) FTS 633-4052.

NINTH CIRCUIT REVERSES HOLDING THAT UNITED STATES IS LIABLE FOR "BIVENS" DAMAGES, AND ALSO REVERSES HOLDINGS THAT FEDERAL EMPLOYEES COMMITTED CONSTITUTIONAL TORTS IN FEDERAL EMPLOYMENT RELATIONSHIP AND THAT RETALIATION VIOLATIVE OF TITLE VII HAD BEEN PROVEN, VACATES AWARDS OF ATTORNEYS' FEES UNDER TITLE VII AND THE EAJA, AND VACATES FINDINGS THAT THE SECRETARY OF THE AIR FORCE WAS IN CIVIL AND CRIMINAL CONTEMPT.

Over a series of years and administrative and judicial proceedings, a civilian employee of the Air Force claimed that she had suffered inverse racial discrimination in violation of her rights under Title VII, culminating in a reduction in force proceeding, and, ultimately, that individual federal employees, and the United States, had committed constitutional torts in addressing her claims. After a lengthy trial, the district court held the United States and the individuals liable in damages on

"Bivens"-type claims. In addition, while finding no evidence of racial discrimination, the district court held the United States liable for retaliation forbidden by Title VII, ordering exceptional promotion and training remedies for plaintiff. The court also awarded substantial compensatory and punitive damages against the United States and the individual defendants, and attorneys' fees under the Equal Access to Justice Act (EAJA) against the United States and the individuals for the constitutional torts, and against the United States under Title VII. Finally, the Secretary of the Air Force was held in civil and criminal contempt for failure to immediately implement the employment terms of the judgment, and substantial fines payable to plaintiff were levied, notwithstanding that, at all relevant times, either the automatic stay provided for in Rule 62(a) of the Federal Rules of Civil Procedure was in effect, or a motion for a stay of execution was pending before the district court.

The Ninth Circuit reversed the judgment of the district court in all respects and vacated the attorneys' fees and contempt rulings. First, the court held that unwaived sovereign immunity forbids "Bivens"-type claims against the United States. The court noted that "the issue [was] foreclosed by a long line of Supreme Court cases," and "also contrary to the implication" of Ninth Circuit precedent.

Next, the court held that the "Bivens"-type claims against the individual defendants, all of whom were government officials or employees responsible for processing plaintiff's Title VII and employment claims, must fail because Bush v. Lucas "precludes Bivens relief based directly on injury to plaintiff's interest in her GS-7 position." The Ninth Circuit interpreted Bush to hold that "the comprehensive scheme established by Congress to remedy violations of constitutional rights in connection with federal employment and personnel policy was exclusive," and could not be augmented by "non-statutory 'Bivens'-type relief." In addition, the "Bivens"-type claims against the individuals failed because "plaintiff has not otherwise demonstrated a deprivation of liberty or property sufficient to implicate the due process clause." The court specifically rejected the proposition that the Air Force's regulations created a cognizable property interest. Accordingly, the district court's finding that the Air Force failed fully to follow its own regulations did not establish a constitutional violation. Finally, the court held that plaintiff "does not possess a liberty interest [in] her 'Civil Service career,'" since mere dismissal does not cause deprivation of liberty, and "the reasons for dismissal [had not been] sufficiently serious to 'stigmatize' or otherwise burden" plaintiff so she would not be "able to take advantage of other employment opportunities."

The finding that plaintiff had been the victim of retaliation forbidden by Title VII was reversed on the grounds that the district court did not address the Air Force's "non-retaliatory

explanations for its actions" and "there was no consideration of the question whether they were pretextual." Therefore, the "full trial process envisaged by [precedent] was short-circuited, and plaintiff was essentially awarded a judgment on the strength of her prima facie case that the defendants had an inadequate opportunity to rebut." Accordingly, the issue of retaliation was remanded "for reconsideration in light of the applicable precedent."

The awards of attorneys fees for both the "Bivens"-type claims and the Title VII claim were vacated, since plaintiff had not prevailed on either genus of claim. Finally, the court vacated the findings of criminal and civil contempt, agreeing with our argument that the district court had abused its discretion in this regard, holding that the sequence of events established that defendants were not in willful disobedience of the court's order. The Ninth Circuit reasoned that, "to find a defendant guilty of 'willful and deliberate defiance of the court's order,' . . . when a stay has been immediately sought would render meaningless the whole process by which parties invoke the power of the courts to defer the effect of their judgments." In addition, the court held that "the Supreme Court has recognized that 'willfulness' may be qualified 'by a concurrent attempt . . . to challenge the order by . . . appropriate procedures," and found the Air Force's motion for a stay such an "appropriate procedure."

Clemente v. United States, ___F.2d___, Nos. 83-6187, 83-6188, 83-6430 (9th Cir. July 24, 1985). D. J. # 35-12C-288.

Attorneys: Barbara L. Herwig (Civil Division) FTS 633-5425; Edward R. Cohen (Civil Division) FTS 633-4331.

ELEVENTH CIRCUIT HOLDS THAT SUIT TO ENFORCE A CONSENT JUDGMENT BY "PIERCING THE CORPORATE VEIL" IS NOT BARRED BY SIX-YEAR STATUTE OF LIMITATIONS GOVERNING CONTRACT CLAIMS.

This case arose out of the excessive profits reaped by a defense contractor during the Vietnam War. In 1980, the government obtained a consent judgment for $2.2 million against the contractor under the Renegotiation Act. When the government tried to enforce the judgment, however, it discovered that the contractor had turned itself into a "shell" by paying out substantially all of its assets as dividends to the company that owned all of its stock. The government therefore filed suit against the parent company, alleging that the "corporate veil" should be pierced to enforce the consent judgment against the parent.

The district court entered summary judgment against the government on the ground that the suit was barred by 28 U.S.C. §2415(a)'s six-year statute of limitations for claims "founded upon any contract." On appeal, the adverse judgment was reversed on the ground that consent judgments are not contracts within the meaning of Section 2415(a) and are subject to the same rules governing execution as any other judgment. See, Rule 69(a), Federal Rules of Civil Procedure. The court of appeals expressed no opinion regarding our further contention that there is no statute of limitations on proceedings brought by the government to enforce a judgment, or about whether the facts of this case justify "piercing the corporate veil," and remanded to the district court for development of those issues.

United States v. Southern Fabricating Co., Inc., ___F.2d___, No. 84-7337 (11th Cir. July 1, 1985). D. J. # 77-1-434.

Attorneys: Leonard Schaitman (Civil Division) FTS 633-3441; Marleigh Dover (Civil Division) FTS 633-4820; Marc Johnston (Civil Division) FTS 633-3305.

FEDERAL RULES OF EVIDENCE

Rule 804(b)(1). Hearsay Exceptions; Declarant Unavailable. Former Testimony.

Defendants, found guilty of several counts of wire fraud, appealed, arguing that the admission of the deposition of Herbert Sanburg, a former business associate, was taken without any cross-examination in an earlier civil proceeding which violated their right to confront witnesses against them. The district court disagreed and admitted the deposition on the grounds that the defendants had an adequate opportunity to appear at the deposition, that the defendants knew what Sanburg would say, and that the defendants were represented by counsel and were parties to the civil litigation for which the deposition was taken. At the time of Sanburg's deposition, the government had not returned a criminal indictment against any party. Sanburg did make an agreement with the government to testify against defendants in return for a promise that he would not be a target of any legal proceedings. This agreement between Sanburg and the government was not disclosed until a short time before defendants' criminal trial. Sanburg died soon after his deposition was taken.

The court of appeals found under Rule 804(b)(1) that even if defendants had sufficient notice and opportunity to cross-examine, they must have a "similar motive to develop the testimony by direct, cross, or redirect examination." In determining whether a party had such a motive, a court must evaluate not only

the similarity of the issues, but also the purpose for which the testimony is given. Factors that influence motive to develop testimony include (1) the type of proceeding in which the testimony is given, (2) trial strategy, (3) the potential penalties or financial stakes, and (4) the number of issues and parties. Consideration of the second and third criteria persuaded the court of appeals that Sanburg's deposition was inadmissible in the criminal trial under Rule 804(b)(1).

(Reversed and Remanded.)

United States v. Feldman and Martenson, ___F.2d___, Nos. 83-1327, 83-1328 and 84-1264, (7th Cir. May 1, 1985).

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16(d)(2). Discovery and Inspection. Regulation of Discovery. Failure to Comply With a Request.

Defendant, convicted of causing the transportation of illegal aliens, appealed, alleging that the district court erred in denying the admission of a tape recording of defendant and two unnamed border patrol agents which was relevant evidence in support of his defense of entrapment. The government objected to admission because the conversation on the tape was not timely, the identity of the parties was unknown, and no opportunity to determine who they were existed. Defendant offered no explanation for his failure to produce the tape in response to the government's discovery request. If a party fails to comply with Rule 16(d)(e) the district court may, inter alia, "prohibit the party from introducing evidence not disclosed . . . ." Defendant also contended that the district court erred in refusing to admit a letter he had written to the grand jury.

The court of appeals found that the district court did not abuse its discretion in denying the admission of the tape recording because defendant's response to the government's motion for disclosure of evidence did not include or mention the tape recording as evidence as required by Rule 16(d)(2). Failure to admit the tape prejudiced neither defendant's right to present his entrapment defense nor his right to a fair trial. The district court properly excluded the letter from evidence because the self-serving statements of innocence were made by the defendant after the offense was discovered.

(Affirmed.)

United States v. Durwood Walker Woosley, 761 F.2d 445, (8th Cir. April 11, 1985).

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____

TO: Honorable _____
United States District Judge

RE: Notice of the Names of Persons To Whom Disclosure Has Been Made of Matters Occurring Before the Grand Jury Empanelled On _____.

Please be advised that it has been necessary to disclose matters occurring before the grand jury empanelled by you on _____ to the following persons.

(i) Names of attorney(s) for the government for use in the performance of such attorney's(s') duty to enforce the federal criminal law:

1._____, _____
Title

2._____, _____
Title

(ii) Names of government personnel (including personnel of a state or subdivision of a state) deemed necessary to assist the aboved-named government attorney(s) in the performance of such attorney's (s') duty to enforce the federal criminal law:

1._____, _____
Title

2. _____, _____
Title

I hereby certify that each of the above-named person(s) has been fully advised of and understands the restrictions on the Grand Jury Secrecy requirements imposed by Rule 6, Federal Rules of Criminal Procedure.

It is required that the court return this notice of disclosure of grand jury material to the United States Attorney's office in the attached envelope for maintenance in the files of this office.

United States Attorney

By: _____
Assistant United States Attorney

The Court has reviewed the above and agrees that this disclosure notice, pursuant to Rule 6, Federal Rules of Criminal Procedure, be returned to the United States Attorney's Office for maintenance and custody in their files.

United States District Judge _____ Date

It has been suggested that the individual to whom the disclosure notice pertains should also be required to sign a standard statement for secrecy requirements as indicated below for filing in the United States Attorney's office.

> I hereby certify that I have been fully advised and understand the restrictions on the Grand Jury Secrecy requirements imposed by Rule 6 of the Federal Rules of Criminal Procedure. Any and all matters occurring before the grand jury are secret and cannot be disclosed and knowing violations of Rule 6 may be punished as a contempt of court.

Should you have additional questions, contact the Office of Legal Services at FTS 633-4024.

# Memorandum

Subject

Advisement Against Proposing Judicial Orders Which Specifically Direct Forfeited Property to be Shared With State and Local Agencies

Date

MAY 2 3 1985

SST:JK:BC:JCM:flt

To

United States Attorneys' Offices, Strike Force Offices, and Criminal Division Attorneys

From

SST Stephen S. Trott
Assistant Attorney General
Criminal Division

Recently, it has come to the attention of the Department of Justice that several Federal prosecutors have asked the district courts to address in forfeiture orders the issue of transferring forfeited property to State and local law enforcement authorities. As shown below, the pertinent statutes and their legislative histories do not provide the courts with any role in the decision to share forfeited property with State and local law enforcement agencies. As a result, Federal prosecutors should not propose forfeiture orders which contain language directing the Government to share forfeited property with State and local governments. Instead, proposed orders should instruct the Government only to dispose of forfeited assets in accordance with the law.

The Comprehensive Crime Control Act of 1984, Pub. L. 98-473, §318, 98 Stat. 1837 (October 12, 1984), amends 19 U.S.C. §1616 to allow new ways to dispose of forfeited property. The new Section 1616(a) authorizes the Secretary of the Treasury to transfer forfeited property to a State or local agency which participated directly in the seizure or forfeiture of the property. Similarly, 21 U.S.C. §881(e), as amended by Section 309 of the Comprehensive Crime Control Act, provides that the Attorney General may transfer drug-related property forfeited under Title 21, United States Code, to another Federal agency, or, pursuant to 19 U.S.C. §1616(a), to an assisting State or local agency. The statute also notes that such a decision by the Attorney General is not subject to judicial review.

The legislative history of Sections 616 and 309 reflects the clear Congressional intent to vest the Executive with the means to share the fruits of profitable forfeitures with cooperating State and local law enforcement agencies. Commenting on Section 318 (19 U.S.C. §1616(a)), the key legislative report on the Comprehensive Crime Control Act (S.Rep. No. 225, 98th Cong., 1st Sess. 219 (1983)) states that "[s]ubsection (a) of this new section permits the transfer of forfeited property to another Federal agency, or to a State or local agency which participated in the case which led to the forfeiture." In like manner, the

report on Section 309 (21 U.S.C. §881(e)) notes that "there is presently no mechanism whereby the forfeited property may be transferred to [cooperating State and local law enforcement agencies] for their official use." Id. at 216. Accordingly, to remedy this situation, the new section 881(e), "in conjunction with the Tariff Act amendment [19 U.S.C. §1616] cited above, will permit such transfers and thereby should enhance important cooperation between Federal, State, and local law enforcement agencies in drug investigations."

The decision to share forfeited property with State and local agencies is obviously one that can be effected only after the administrative or judicial resolution of the forfeiture action on behalf of the Government. Thus, it is an issue that does not affect the forfeitability of the property itself, but rather provides the Executive Branch with an opportunity to recognize the contribution of State and local law enforcement to the prosecution of a forfeiture matter. Accordingly, Congress placed the authority to transfer forfeited property to local enforcement interests with the Attorney General (21 U.S.C. §881(e)) and the Secretary of the Treasury (19 U.S.C. §1616).

Traditionally, upon ordering the forfeiture of property, district courts simply require the Government to dispose of the property "in accordance with law." This general directive mandates the Government to dispose of forfeited property pursuant to any option provided by statute. Before the enactment of the Comprehensive Crime Control Act, there were basically two methods of disposal: transfer of the property to a Federal agency for official use, or sale and deposit of the proceeds in the Federal coffers. Now, a third option of transferring forfeited property to State and local agencies has been added. This new addition, however, does not posit a new controversy for district courts to address. Rather, it places a new option for the disposal of forfeited property squarely in the hands of the Executive Branch.

Together with Associate Attorney General D. Lowell Jensen, who has reviewed this matter, I advise against requiring, or even recommending, that district courts be asked through proposed orders to address the issue of disposal beyond the general directive that the disposal of the forfeited property be conducted "in accordance with law." To do otherwise would invite judicial involvement in an area beyond the courts' statutory purview. Quite conceivably, a court asked to direct the transfer of property from the Federal to a State government may also inquire whether the percentage of transferred property accurately reflects the State's contribution to the forfeiture of the res. In sum, I see no advantage, and sense the danger of undue judicial involvement, in asking courts to do more than to direct the Government to dispose of forfeited property in a manner sanctioned by statute.

# JURIS DATA BASE LISTING
## Revised June 1985

### CASELAW

| | |
|---|---|
| U.S. Supreme Court | 178 U.S. (1900) - Slips |
| Federal Reporter, 2d Series | 300 F.2d (1962) - Slips |
| Federal Supplement | 332 F.Supp (1970) - Slips |
| Court of Claims | 134 Ct. Cl. - 231 Ct. Cl. (1956 - February 1982) |
| Claims Court | 1 Cl. Ct. (1982) - Slips |
| Federal Rules Decisions | 73 F.R.D. (1976) - Slips |
| Court of Military Review | 1 C.M.R. - 50 C.M.R. (1951-1975) |
| Military Justice Reporter | 1 M.J.R. - Slips (1974 - Present) |
| Atlantic 2d Reporter | 370 A.2d (1977) - Present (D.C. cases only) |
| Bankruptcy Reporter | 1 B.R. (1979) - Slips |

### STATLAW - STATUTORY LAW

| | |
|---|---|
| Public Laws | 93rd - 98th Congress (1-149 and 473) |
| United States Code | 1982 Edition |
| ** Executive Orders | 12/31/47 - 7/1/85 |
| Civil Works Laws | Vols. 1-4, (1790 - 1966) and Selected Public Laws to September, 1983 |
| Comprehensive Crime Control Act of 1984 | Pub. L. No. 98-473 (CCCA), Pub. L. No. 98-573 (Tariff Act), Pub. L. No. 98-596 (Fine Enforcement Act) and Criminal Division Handbook on the Comprehensive Crime Control Act of 1984 |

### ADMIN - ADMINISTRATIVE LAW

| | |
|---|---|
| Published Comptroller General Decisions | Vols. 1-63 (1921-July 1984) |
| Unpublished Comptroller General Decisions | (1/5/51 - 9/5/84) |
| Opinions of the Attorney General | Vols. 1-43 (1791-1980) |
| O.L.C. Memorandums | Vols. 1-3 (1977-1979) |

* New JURIS File
** Major File Additions

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|---|---|
| Board of Contract Appeals | Vols. 56-2 to 83-2 (7/56-11/83) |
| Federal Labor Relations Authority | Vols. 1-14 (1/79-5/84) |
| Decisions & Reports on Rulings of the Asst. Sec. of Labor for Labor Management Relations | 1 A/SLMR - 8 A/SLMR (1/73-12/78) |
| Federal Labor Relations Council | Vols. 1-6 (1/70-12/78) |
| Rulings on Requests of the Asst. Sec. of Labor for Labor Management Relations | Volume 1 (2/70-6/75) |
| HUD Administrative Law Decisions | Selected Decisions |
| ** Merit Systems Protection Board | Vols. 1-13 (2/79 - 3/83) |
| ** Board of Immigration Appeals Decisions | Vols. 1 (1940)-18 (1984) and slips |

REGS - FEDERAL REGULATIONS

| | |
|---|---|
| Code of Federal Regulations | 1984 Edition, Titles 1-45, 47-50<br>1985 Edition, Titles 1, 4, 7-9, 11-16, and 23 |
| Unified Agenda of Federal Regulations | April, 1985 Edition |

DIGEST - WEST HEADNOTES

| | |
|---|---|
| Supreme Court Reporter | 1961 - advance sheets |
| Federal Reporter, 2d Series | 1960 - advance sheets |
| Federal Supplement | 1960 - advance sheets |
| Federal Rules Decisions | 1960 - advance sheets |
| Regional Reporters (State Cases) | 1967 - advance sheets |

TAX

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| U.S. Tax Court Decisions | Vols 1-66 (11/42 - 9/76) |
| U.S. Board of Tax Appeals Decisions | Vols 19 - 47 (2/30-11/42) |
| Enforcement Decisions | Tax Division's Summons Enforcement Decisions Current to 3/1/84 |
| Tax Protesters | Tax Division Tax Protester Decision List |

FORENSIC SCIENCE - Mid-Atlantic Association of Forensic Scientists Newsletter

| | |
|---|---|
| Scientific Sleuthing Newsletter | July, 1976 - Winter, 1985 |

SHEPARD'S CITATIONS

| | |
|---|---|
| United States Reports | 1944 - Present |
| Supreme Court Reporter | 1944 - Present |
| Lawyer's Edition (1st & 2d Series) | 1944 - Present |
| Federal Reporter | 1970 - Present |
| Federal Reporter Second Series | 1970 - Present |
| Federal Supplement | 1970 - Present |
| Federal Rules Decisions | 1970 - Present |
| Court of Claims | 1970 - Present |
| Court Martial Reports | 1951 - Present |
| Military Justice Reporter | 1975 - Present |

INTERNATIONAL AGREEMENTS

| | |
|---|---|
| Bevans: Treaties and Other International Agreements of the United States | Vols. 1-12 (1776-1949) |
| United States Treaties and Other International Agreements | Vols. 1-32 (1/50 - 12/81) |
| Department of Defense Unpublished International Agreements | (6/47 - 1/84) |

WRKPRDT - DEPARTMENT OF JUSTICE WORK PRODUCTS

| | |
|---|---|
| Criminal Division Monographs | Selected Monographs |
| Civil Division Monographs | Selected Monographs |

LEGHIST - Legislative Histories of Federal Laws

** Equal Access to Justice Act (EAJA) Legislative History

BRIEFS - DEPARTMENT OF JUSTICE BRIEFS

| | |
|---|---|
| Office of the Solicitor General Briefs | Briefs since the 10/1982 Term |
| Civil Division Briefs | Selected Appellate Briefs (11/81 - Present) |
| Civil Division Trial Briefs | Selected Trial Briefs (1977 - Present) |
| Civil Rights Division Briefs | Selected Appellate Briefs (1/80 - Present) |
| Land and Natural Resources Division Briefs | Selected Appellate Briefs (12/83 - Present) |

INDLAW - INDIAN LAW

| | |
|---|---|
| Opinions of the Solicitor (Interior) | Vols. 1 and 2 (1917 - 1974) |
| Ratified Treaties | 1778 - 1880 |
| Unratified Treaties | 1801 - 1868 |

INDLAW - INDIAN LAW (Cont'd)

| | |
|---|---|
| Presidential Proclamations | 1879 - 1968 |
| Executive Orders and Other Orders Pertaining to Indians | 1871 - 1971 |

FOIA - FREEDOM OF INFORMATION ACT

| | |
|---|---|
| ** FOIA Update Newsletter | Vol. 1, No. 1 - Vol. 6, No. 2 (Fall 1979 - Spring 1985) |
| FOIA Short Guide | FOIA Case List Publication (September 1984 Edition) |

REFERENZ - TRAINING AIDS FOR JURIS USERS

| | |
|---|---|
| JURIS Reference Manual, Parts I - IV | November 1984 Edition |

## EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS
## TELETYPES TO ALL UNITED STATES ATTORNEYS

07-29-85 From William P. Tyson, Director, Executive Office for United States Attorneys, by Susan A. Nellor, Director, Office of Legal Services, re: "Application and Decision Forms for the Transfer of Federally Forfeited Property."

07-30-85 From William P. Tyson, Director, Executive Office for United States Attorneys, by Susan A. Nellor, Director, Office of Legal Services, re: "Amendment to Rule 6(e), Federal Rules of Criminal Procedure."

07-31-85 From C. Madison Brewer, Director, Office of Management Information Systems and Support, by Tim Murphy, Assistant Director, Debt Collection Staff, re: "Development of A Model Debt Collection Act for the Collection of Debts Owed to the United States."

08-01-85 From C. Madison Brewer, Director, Office of Management Information Systems and Support, by Tim Murphy, Assistant Director, Debt Collection Staff, re: "Change in Federal Civil Postjudgment Interest Rate."

08-01-85 From William P. Tyson, Director, Executive Office for United States Attorneys, by Susan A. Nellor, Director, Office of Legal Services, re: "Amendment to Rule 6(e), Federal Rules of Criminal Procedure."

08-05-85 From William P. Tyson, Director, Executive Office for United States Attorneys, by Thomas G. Schrup, Acting Director, Office of Legal Education, re: "Classified Information Seminar, Washington, D. C., September 19-20, 1985."

08-06-85 From C. Madison Brewer, Director, Office of Management Information Systems and Support, by Tim Murphy, Assistant Director, Debt Collection Staff, re: "Proposed Executive Office Basic Debt Collection Conference."

08-06-85 From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Status of United States Attorneys."

08-08-85 From William P. Tyson, Director, Executive Office for United States Attorneys, re: "Candidates Under Consideration for United States Attorneys."

08-08-85 From Richard L. DeHaan, Director, Office of Administration and Review, re: "Administrative/-Personnel Changes."

08-08-85 From C. Madison Brewer, Director, Office of Management Information Systems and Support, by Tim Murphy, Assistant Director, Debt Collection Staff, re: "VA Claim Referral Packages."

08-12-85 From Richard L. DeHaan, Director, Office of Administration and Review, re: "Congressional Excalibur Award."

08-13-85 From William P. Tyson, Director, Executive Office for United States Attorneys, by Judith H. Friedman, Special Counsel, re: "Marijuana Eradication Campaign."

08-13-85 From C. Madison Brewer, Director, Office of Management Information Systems and Support, by Tim Murphy, Assistant Director, Debt Collection Staff, re: "Claims Collection Litigation Report."

# UNITED STATES ATTORNEYS' LIST

| DISTRICT | U.S. ATTORNEY |
|---|---|
| Alabama, N | Frank W. Donaldson |
| Alabama, M | John C. Bell |
| Alabama, S | J. B. Sessions, III |
| Alaska | Michael R. Spaan |
| Arizona | Stephen M. McNamee |
| Arkansas, E | George W. Proctor |
| Arkansas, W | W. Asa Hutchinson |
| California, N | Joseph P. Russoniello |
| California, E | Donald B. Ayer |
| California, C | Robert C. Bonner |
| California, S | Peter K. Nunez |
| Colorado | Robert N. Miller |
| Connecticut | Alan H. Nevas |
| Delaware | William C. Carpenter, Jr. |
| District of Columbia | Joseph E. diGenova |
| Florida, N | W. Thomas Dillard |
| Florida, M | Robert W. Merkle |
| Florida, S | Leon B. Kellner |
| Georgia, N | Larry D. Thompson |
| Georgia, M | Joe D. Whitley |
| Georgia, S | Hinton R. Pierce |
| Guam | David T. Wood |
| Hawaii | Daniel A. Bent |
| Idaho | Maurice Owens Ellsworth |
| Illinois, N | Anton R. Valukas |
| Illinois, S | Frederick J. Hess |
| Illinois, C | Gerald D. Fines |
| Indiana, N | James G. Richmond |
| Indiana, S | John D. Tinder |
| Iowa, N | Evan L. Hultman |
| Iowa, S | Richard C. Turner |
| Kansas | Benjamin L. Burgess, Jr. |
| Kentucky, E | Louis G. DeFalaise |
| Kentucky, W | Alexander T. Taft, Jr. |
| Louisiana, E | John Volz |
| Louisiana, M | Stanford O. Bardwell, Jr. |
| Louisiana, W | Joseph S. Cage, Jr. |
| Maine | Richard S. Cohen |
| Maryland | Catherine C. Blake |
| Massachusetts | William F. Weld |
| Michigan, E | Joel M. Shere |
| Michigan, W | John A. Smietanka |
| Minnesota | Francis X. Hermann |
| Mississippi, N | Glen H. Davidson |
| Mississippi, S | George L. Phillips |
| Missouri, E | Thomas E. Dittmeier |
| Missouri, W | Robert G. Ulrich |

## UNITED STATES ATTORNEYS

| DISTRICT | U.S. ATTORNEY |
|---|---|
| Montana | Byron H. Dunbar |
| Nebraska | Ronald D. Lahners |
| Nevada | William A. Maddox |
| New Hampshire | Richard V. Wiebusch |
| New Jersey | Thomas W. Greelish |
| New Mexico | William L. Lutz |
| New York, N | Frederick J. Scullin, Jr. |
| New York, S | Rudolph W. Giuliani |
| New York, E | Raymond J. Dearie |
| New York, W | Salvatore R. Martoche |
| North Carolina, E | Samuel T. Currin |
| North Carolina, M | Kenneth W. McAllister |
| North Carolina, W | Charles R. Brewer |
| North Dakota | Rodney S. Webb |
| Ohio, N | Patrick M. McLaughlin |
| Ohio, S | Christopher K. Barnes |
| Oklahoma, N | Layn R. Phillips |
| Oklahoma, E | Roger Hilfiger |
| Oklahoma, W | William S. Price |
| Oregon | Charles H. Turner |
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| Pennsylvania, M | James J. West |
| Pennsylvania, W | J. Alan Johnson |
| Puerto Rico | Daniel F. Lopez-Romo |
| Rhode Island | Lincoln C. Almond |
| South Carolina | Vinton DeVane Lide |
| South Dakota | Philip N. Hogen |
| Tennessee, E | John W. Gill, Jr. |
| Tennessee, M | Joe B. Brown |
| Tennessee, W | W. Hickman Ewing, Jr. |
| Texas, N | Marvin Collins |
| Texas, S | Henry K. Oncken |
| Texas, E | Robert J. Wortham |
| Texas, W | Helen M. Eversberg |
| Utah | Brent D. Ward |
| Vermont | George W. F. Cook |
| Virgin Islands | James W. Diehm |
| Virginia, E | Elsie L. Munsell |
| Virginia, W | John P. Alderman |
| Washington, E | John E. Lamp |
| Washington, W | Gene S. Anderson |
| West Virginia, N | William A. Kolibash |
| West Virginia, S | David A. Faber |
| Wisconsin. E | Joseph P. Stadtmueller |
| Wisconsin, W | John R. Byrnes |
| Wyoming | Richard A. Stacy |
| North Mariana Islands | David T. Wood |